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NO. 2753.

United States Circuit Court of Appeals

For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Plaintiff in Error,

vs.

LESLIE WILLARD, a minor, by JOSEPH J. LAVIN, his *Guardian ad Litem,*

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the District Court of the United States, Eastern District of Washington, Northern Division.

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509 Mohawk Building,
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This is an action brought by Leslie Willard, a minor, through his *Guardian ad Litem*, against the Great Northern Railway Company, to recover damages for personal injuries. Trial of the cause resulted in a verdict in favor of plaintiff, and from the judgment entered thereon, this appeal is prosecuted.

Briefly stated, the facts are substantially as follows: The minor plaintiff resides at Springdale, Washington, a town on defendant's line of railway, in the State of Washington, at which point the railway company owns and uses in connection with its line of railway, depot grounds and switch yards. About 100 feet east of the depot is a public crossing; and the town being situate on both sides of the track, this crossing furnishes the only means of ingress and egress from one section of the city to the other (Tr. 14-35). The school is located on the north side of the track and school children use the roadway and crossing daily (Tr. 35). In the early part of January, 1914 (Tr. 36), defendant purchased and had delivered upon its right of way, a large number of hewn railway ties, which were unloaded and piled upon the right of way of the company, a few feet east of the public high-

way referred to (Tr. 20). The ties were piled eight ties high (Tr. 14), the end nearest the roadway being straight up and down, one on top of the other (Tr. 19). The ties were from six inches to fourteen inches wide on the face (Tr. 41), were not of uniform height or width (Tr. 41) and a wide tie was set upon a narrow tie, and *vice versa,* just as they were reached (Tr. 41). The ties were covered with snow and ice and were placed upon snow at the bottom, from 10 to 12 inches deep (Tr. 41). The men who unloaded the ties, admitted they were not piled solidly (Tr. 43). In many places, there were spaces of from three to eight inches between the ties contained in the pile (Tr. 16, 19, 31, 37). No one, on behalf of the railway company, directed the manner in which the ties should be piled (Tr. 40) and the section foreman of the company was present, part of the time, while the ties were being unloaded from the wagons, or sleighs, and piled (Tr. 40). The ties were not secured, braced or bound in any manner (Tr. 20, 37, 41). The division roadmaster, called as a witness by the railway company, testified that if the ties were bound, they would not fall (Tr. 64).

The ties were 100 feet east of the depot and across the track and could easily been seen from

the depot, where the railway company employed an agent and operator (Tr. 30, 36, 38, 39, 40). Without objection on the part of the company, numerous small boys, ranging in age from 10 to 16 years, played in, upon and about the pile of ties, engaging in such games as "wood tag" and "hide-and-seek," during the day, for hours at a time, during all of the time the ties remained there (Tr. 29-30, 31, 32, 33-34).

On February 23rd, 1914, the minor plaintiff, aged at that time ten years, in company with a boy of about the same age, got upon the pile of ties for the purpose of playing "wood tag" (18) when the end of the pile nearest the roadway gave way and fell, and one of the ties weighing 300 pounds (Tr. 36, 37) fell upon the right leg of plaintiff, inflicting severe and permanent injury, causing a bony formation at the knee joint, rendering the leg stiff and crippled.

After verdict, motion for new trial was filed, argued and overruled; judgment was entered upon the verdict, and this appeal is prosecuted upon numerous assignments of error (Tr. 76, 77, 78), none of which possess substantial merit; and all

of which were vigorously urged before the trial court and promptly overruled.

The assignments of error, as presented, embrace numerous repetitions, but are properly and fairly grouped as follows:

1. That no cause of action was proved, or that no negligence upon the part of defendant was shown.

2. That the ties were not alluring or attractive.

3. That they were not dangerous.

4. That minor plaintiff himself was guilty of negligence.

5. That the court erred in permitting witness R. B. Willard to testify as to the number of ties that fell.

6. That the court erred in permitting witness C. W. Magers to answer the question, "Mr. Magers, just tell how those ties were piled."

7. That the court refused to admit defendant's Exhibit 7 in evidence.

For the sake of brevity and to make manifest the frivolous assignments of error here brought for your Honors' consideration, these assignments

will not be discussed in order, but will be taken up, beginning with the last assignment first.

Assignment 7.

The exhibit which the court refused to admit, is a notice issued by the company containing specifications governing the size and character of ties which the company desired to purchase, and requires certain things to be performed by the persons who sell and deliver ties to the company. So far as the minor plaintiff in this case is concerned, the exhibit is immaterial and self-serving. The failure of the men who delivered the ties, to comply with its requirements, if they did fail, could make no difference as far as this action is concerned. The negligence here complained of was in permitting the pile of ties to become dangerous, and in permitting children of tender years to play upon and about them, and the railway company cannot absolve itself from responsibility by attempting to show that some third party violated some rule or regulation of the company resulting in injury to a person not a party to nor in any way connected with or concerned in their private arrangements.

Assignment 6.

C. W. Magers was called as a witness on behalf of plaintiff; it was he who sold and delivered the ties in question to the railway company. His testimony is found at pp. 38-42 of the Transcript, where he specifically described in detail upon direct and cross examination the manner in which the ties in question were piled. He was recalled by defendant during the presentation of their case (Tr. 59) and was asked the question referred to, to which objection was properly sustained. If what has so far been said, fails to disclose the manifest frivolous nature of the assignment now predicated upon the court's refusal to permit an answer to the question, so fully gone over during his original testimony, then from p. 61 of the Transcript, we quote as follows:

> THE COURT: * * * I will sustain the objection; that is, if it is going to conflict in any way with the testimony already given.
>
> MR. ALBERT: *It won't conflict with his testimony at all.*

The only purpose therefore, would be at most, a repetition of his former testimony and the objection was properly sustained. If the subject was gone over thoroughly when the witness was called

by plaintiff, as the record discloses (Cross Examination by Mr. Albert, Tr., p. 41) and under the remark of counsel referred to, "it won't conflict with his testimony at all," there can possibly be no serious complaint now made that the court erred in rejecting the proffered testimony.

Assignment 5.

There was no dispute that the ties fell, nor was there any dispute that the fall of the ties resulted in injury to plaintiff. The number that fell is immaterial except that it is some evidence of the negligent manner in which the ties were piled. The plaintiff testified that from six to nine ties fell (Tr., p. 15). Witness Williams, does not state the exact number of ties that fell, but says he picked the "ties" off of the boy (Tr., p. 35), and when recalled (Tr., p. 46), says a part of two tiers fell. R. B. Willard, father of the minor plaintiff, visited the scene of the accident the following day and was permitted to testify that six, seven or eight ties fell (Tr., p. 46) and that "there was part of two tiers fell, and they were eight ties high" (Tr., p. 46). Witness Cline, called by defendant, said three ties fell (Tr., p. 48). With no evidence that the conditions had changed, and

the ties which he testified to having been upon the ground at the time, it was a circumstance which the jury had a right to consider as bearing upon the number of ties that fell, if the number that fell had any materiality. The same facts were testified to by other witnesses, and therefore is cumulative, and no legitimate claim can be made that in permitting the witness to answer, the court committed prejudicial error.

Assignment 4.

This assignment involves the negligence of the minor plaintiff. To argue it would be to waste the time of this court, already greatly overburdened. It is absolutely without merit and at most was a question to be determined by the jury under appropriate instructions, which were given and of which no complaint has been or is now made.

Assignment 3.

This assignment and assignment 1, will be hereafter discussed together as they embrace the same question.

Assignment 2.

Counsel complain in this assignment that evidence does not show that the ties in question were

not alluring or attractive. The testimony of Harry Whitney (Tr. 29, 30), evidences that he, together with four or five boys played together upon the ties two and three times a day, nearly all winter "just for fun, playing 'wood tag.'" Claire Willard, brother of the minor plaintiff, testified that he and three or four other boys played upon the ties at numerous times (Tr. 31). Clifford Ragsdale, says he played upon the ties two or three times a day with from two to three boys, playing "wood tag" upon the pile of ties, for a period of about two months (Tr. 32). Ervin LaFrance testified that he, in company with two or three other boys, played "wood tag" upon the ties for about a month (Tr. 33). Frank Venhuis testified that he saw five and six boys playing "hide-and-seek" and "cross tag" on the ties almost daily for two or three months.

A reading of the testimony above referred to is totally destructive of the contention of defendant that the evidence fails to disclose that the ties in question were not alluring or attractive to children and renders useless and to no avail, any further discussion upon the subject.

Assignments 1 and3.

Before proceeding with a discussion of these two assignments, Your Honors' attention is respectfully directed to the record brought here for your consideration, which evidences the dangerous condition of the property of defendant, the fact that such premises and the pile of ties here concerned were alluring and attractive to children of tender years, who in the pursuit of pleasure and who following the childish instincts of nature, played the games that all boys, now and ever have played, and further evidences that for at least two months prior to the happening of the accident which forms the subject matter of this case, the defendant knew that the pile of ties were being used as a playground by children. The doctrine through which defendant would seek to absolve itself from liability in this case, is that the minor plaintiff was a trespasser to whom they owed no duty, and thereby ask this court to abandon the principles of humanity and public policy heretofore adopted by this court, and to ask this court to leave entirely out of view the tender years, lack of judgment and infirmity of understanding and comprehension of the child, and thus supplant

property above humanity. Such doctrine has, by this court, and numerous courts of accredited respectibility, been dominated as cruel and barbarous, and unworthy of a civilized jurisprudence. They would further visit upon the minor plaintiff the consequences of his trespass, in which they acquiesced to such an extent as to amount to an implied invitation, as though he were of mature years and in the possession of faculties capable of learning and appreciating the dangers which beset him. But such claim lacks logic, and in not the settled law. The rule properly stated, of which there can be no logical dispute deduced from the authorities, briefly stated, is to the effect that, the owner of property or premises, which, from their nature are particularly attractive to children, who in obedience to their childish instincts are likely to play in, upon and about such premises, involving danger to them is under the duty of exercising reasonable care to the end of keeping such premises in such a condition as to prevent them from injuring themselves. The evidence here brought for your consideration, convincingly establishes every element involved in that abstract and accurate statement of the law. The ties were attractive and alluring to children; they played upon and

about them in large numbers, daily, they were dangerous and defendant exercised absolute indifference and lack of care for their protection.

In the case of St. Louis & S. F. R. Co. v. Underwood (Fifth Circuit), 194 Fed. 363, a minor was injured by the fall of a pile of lumber, around and about which the defendant permitted children to play. There was a verdict for the plaintiff, which was affirmed upon appeal, the court, at page 364, adopting the following language:

> "Examination of the testimony makes it evident that the material allegations of the declaration are supported by the proof. That the conduct of defendant, in placing lumber in an exposed situation and easily accessible to children of tender years, constitutes actionable negligence, plainly appears by reference to the following authorities." (Citing cases.)

In Union Pacific Ry. Co. v. McDonald, 152 U. S. 262, 38 L. Ed. 434, Mr. Justice Harlan quotes the following language used by Chief Justice Cooley in Powers v. Harlem, 53 Mich. 507, 19 N. W. 257, as follows:

> "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with a duty of care and caution towards them, must calculate upon this, and take precautions ac-

> cordingly. If they leave exposed to the observation of children, anything which would be tempting to them, and which they, in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken."

In Snare & Triest Co. v. Friedman (Third Circuit), 169 Fed. 1, the defendant piled eye-beams upon the sidewalk. These beams weighed 1000 pounds each, and after being so piled, permitted children to play upon and about them. A minor was injured by the fall of one of the beams, and after action and recovery a verdict for plaintiff was affirmed. *The fact that the beams were placed upon a public sidewalk was not a controlling influence in the case,* but the case was determined upon the negligent conduct of defendant in permitting the beams to be carelessly piled at a point frequented by children for recreation, and the court held that the defendant was guilty of negligence, and that a duty was owed to children, who, to their knowledge, were accustomed to play and sit upon the beams, to use reasonable care under the circumstances to prevent the piles from being in an unstable condition, as would be liable to cause injury to such of these children as might come in

contact therewith. In this case, numerous authorities are collected and referred to.

In Pierce v. Lyden (Second Circuit), 157 Fed. 552, the defendant stored oil in barrels from which the heads had been knocked off, in an unlocked shed and for some time, with the knowledge of the watchman of defendant, permitted boys to dip oil from the barrels in tomato cans and other receptacles, and light it on the ground, or throw it upon fires they had started. Plaintiff, a minor, while playing with other boys, was injured by the explosion of oil which was thrown upon the fire. The judgment of the lower court in plaintiff's behalf, was affirmed, the court saying:

> "Knowledge of such a notorious and continuous practice as is shown in this case, we think must be imputed to the defendant, and, were this not so, then the knowledge of the night watchman was the defendant's knowledge. Nothing is more attractive to boys than fire, and as they had been for some six months in the habit of throwing the defendant's oil upon fires made by them, and this fact was actually known to the night watchman, we have no doubt that the question of defendant's negligence was properly presented to the jury."

In Branson's Admr. v. Labrot (Kentucky), 50 Am. Rep. 193, the defendant piled lumber in a

city, on an unfenced lot which the public were accustomed to cross and children to play upon, in a negligent manner, so that it fell and killed an infant who played upon it. The lower court sustained a demurrer to the complaint and on appeal, the cause was reversed and remanded, the court holding that it was the duty of defendant, in placing timber upon the lot, to do so in such manner as to make it reasonably safe and secure against injury to children coming thereto, and that the owner should reasonably anticipate such injury to flow therefrom as actually happened. It likewise held, that in such cases the question of negligence is for the jury.

In Price v. Atchison Water Co., 50 Pac. 450 (Kansas), the court says:

> "Where a person maintains upon his premises anything dangerous to life and limb, and of a nature to invite the intrusion of children, he owes them a duty of precaution against harm, and is liable to them for injury from that thing, even though their own act, if not negligent, puts in operation the hurtful agency."

It may be contended by plaintiff in error, as it was upon oral argument in the court below, that the act of the minor plaintiff and his companions

caused the ties to fall. But such is not true. The minor plaintiff testified he had gotten upon the ties, and was upon his knees when they fell and that his companion was at the other corner on the end of the ties (Tr. 18). His companion, called by defendant, testified that the injured minor was not upon the top of the pile of ties when they fell. The question of negligence was submitted to the jury under appropriate instructions, of which no complaint is now, or has been made, and this court cannot say whether the jury adopted the theory of the minor plaintiff, or that testified to by defendant's witness. In any event, it would make no difference so far as the liability of the defendant is concerned, and this question is mentioned only because of the assignment of error, and the oral argument made below. The same claim was made in Pierce v. Lyden (*supra*) where plaintiff contended that the minor was injured by the explosion of oil thrown upon the fire by one of his companions, and where the witnesses for defendant claimed he was injured by running through the burning oil. The defendant there contended the negligent act of the minor was the proximate cause of the accident. The court, passing upon this question, said at page 553:

> "The third assignment of error may be laid out of the case at once, because there is nothing to show that the jury arrived at their verdict by adopting the account that the minor plaintiff was injured as the result of another boy's throwing a can of oil on the fire. They may have adopted the other testimony that he was injured as a result of running and jumping through the flames of oil burning on the ground."

This court has heretofore dealt with a state of facts peculiarly applicable and analagous to those here concerned. The writers of this brief, in exhaustive briefs, and in oral argument, presented like questions fully to this court in the recent case of Thompson v. Coeur d'Alene Lumber Company, 215 Fed. 8. The decision in that case, seems to settle the principles of law contended for by us, and thus renders unnecessary the further discussion of the case at bar.

In view of the record and the rule of law heretofore announced by this court, we insist that there is here involved a plain question of fact, submitted to a jury under appropriate and unquestioned instructions, and that in view of the absence of error, the finding of the jury upon such questions should be conclusive.

We respectfully urge an affirmance of the judgment.

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